IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 649 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

SETA NARAYAN @ SATYANARAYAN MAGNARAI

Appearance:

1. Criminal Appeal No. 649 of 1988
MR K.C.SHAH, APP for Appellant
MR JIVANLAL G SHAH for Respondent

CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 27/01/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

By filing this appeal under Section 378 of the Code of Criminal Procedure Code, 1973 (for short 'Cr.PC'), read with Section 36-B of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') the State has challenged the correctness and legality of the judgement (Exhibit-25) dated April 30, 1988 rendered by the learned Additional Sessions Judge, Kachchh at Bhuj in his capacity as the Presiding Judge of the Special Court constituted under Section 36 of the NDPS Act in Sessions Case No. 9 of 1988 whereby the learned Additional Sessions Judge, Kachchh at Bhuj has acquitted accused/respondent of the offences punishable under Sections 17, 18, 22 and 29(1) of the NDPS Act and also of offences punishable under Sections 66(A), 65(e) and 66 (1) (b) of the Bombay Prohibition Act, 1949 (for short ' Prohibition Act').

2. The facts leading to this present appeal in a nutshell are as follows.

2.1 As per complaint Exhibit-8 dated October 11, 1987 lodged by Police Inspector Shri B.K.Gameti of Bhuj City Police Station, on 11.10.1987 he received an information through informant to the effect that one Tagaram Magnaram Choudhary residing opposite to Pavan Chakki, near Kachchh Mitra Press in Bhuj City is having possession of bottles of foreign liquor, in his house and selling that liquor bottles. On receiving such information, in company of one Police Sub-Inspector Shri K.J.Gohil and other Police personnel, he came to Camp Police Chowki where two persons were called to keep them as panch witnesses during search and seizure. As per the case of the prosecution, a preliminary panchnama was drawn at Camp Police Chowki in presence of panch witnesses. Thereafter, the complainant, in company of police personnel and two panch witnesses left Camp Police Chowki on foot for the premises for which information was received. As per the case of the prosecution that house was situated just opposite to Pavan Chakki on Kachchh Mitra Press Road. At that time two persons were found present in the house. One of them was Tagaram Magnaram Choudhary while other was Seta Narain Magnaram Choudhary who is present respondent before this Court. As per the case of the prosecution the house was searched as per Section 120 of the Prohibition Act in presence of panch witnesses and during the search, 9 plastic bags filled in with black coloured substance were found from an iron tin box. As per the case of the prosecution that black

coloured substance was opium. On getting that substance weighed it was found that it was weighing one and half Kilogram. From each of 9 plastic bags, sample of substance was taken out and that substance taken out from each of 9 bags was packed, sealed and seized as per the prescribed procedure in the presence of panch witnesses. Thereafter, the house was searched, and on making search, the land below the another part of house having no roof was dug out and from that pit, 31 bottles of foreign liquor were found. That bottles were also packed, sealed and seized under panchnama as per the prescribed procedure. Thereafter, pass and permit were asked for, from that two persons but neither of them had any pass or permit for keeping such contraband articles in the said house. That all articles were seized under panchnama in presence of panch witnesses during the period from 19:45 hours to 21:45 hours. As per the case of the prosecution that offences were committed by both the accused at 21:45 hours. The complainant Shri B.K.Gameti, under whose supervision that search and seizure was made, lodged his complaint in Bhuj City Police Station at 22:00 hours on 11.10.1987. That complaint came to be registered as C.R.No.Prohi.96/87. That offence for which complaint was lodged by Shri Gameti, was investigated and ultimately chargesheet came to be filed in the Court of the learned Chief Judicial Magistrate, Bhuj, against both the accused on 5.1.1988. That chargesheet came to be registered as Criminal Case No. 6/88. From record, it appears that the learned Chief Judicial Magistrate, Bhuj passed a committal order under Section 209 of Cr.PC on 25.1.1988. On said case being committed to the Court of Sessions, Kachchh at Bhuj, that case came to be registered as Sessions Case No. 9/88.

2.2 From papers, it appears that present respondent was cited as accused No.2 in the chargesheet. The learned Judge of the trial Court has not made any note with regard to progress against accused No.1 Tagaram Magnaram Choudhary. On examining the record of trial Court, it appears that the learned Chief Judicial Magistrate, before committing the case against the accused No.2 to the Sessions Court, Bhuj, on 13.1.1988 delivered Accused No.1 T.G.Choudhary being a member of Armed Forces, under Section 475 of Cr.PC to Commanding Officer for being tried by Court Martial, and therefore, the learned Judge of the trial Court has conducted the case against accused No.2 only.

3. On the basis of material on record the learned Judge of the trial Court framed charge Exhibit-1 against present respondent on 6.4.1988. The appellant pleaded

not guilty to the charge and claimed to be tried, and therefore, the prosecution has examined following 3 witnesses to prove the case against the accused:

i) PW 1 Ramji Arjan Aahir (Panch witness)
Exhibit-5

ii) PW 2 Babuji Kavaji Gameti (complainant)
Exhibit-7

iii) PW 3 Rajendrasinh Sajjansinh Rana
Exhibit-12

The prosecution also placed reliance on documentary evidence such as panchnama-Exhibit-6, complaint-Exhibit-8, report of the Chemical Analyzer-Exhibit-10, a Newspaper item-Exhibit 11 from daily Newspaper named Kachchh Mitra dated 12.10.1987 and one Receipt-cum-letter received from Forensic Science Laboratory-Exhibit-13. On evidence of prosecution being over, the circumstances appearing against the respondent were brought to the notice of and explained to the respondent for which further statement under Section 313 of Cr.PC was recorded. The defence of the respondent is of complete denial. During the course of recording his further statement he has stated that the house which was searched was not his house and that he is not an owner of that house. He has further stated that he is not residing in that house and that no article of his ownership was found from the house. It is his defence that in the said house, everyday he was used to take meals with his brother and accordingly on that day at about 8:30 PM he had been to that house for taking meals and he was arrested from the place outside the house. During the course of recording his further statement he submitted his written reply Exhibit-15. In support of his defence he produced certain documents with list Exhibit 16. He also examined following two witnesses in his defence:

i) DW 1 Manji Keval Exhibit-20
ii) DW 2 Navinchandra Amrutlal Vyas Exhibit-21

The second witness DW 2 Navinchandra Amrutlal Vyas Exhibit-21 has proved one news item from daily newspaper named Kachchh Mitra dated 12.10.1987. That news item is at Exhibit-11. Accused submitted his Written arguments Exhibit-24. Thereafter, after analysing and appreciating the evidence on record and after hearing the arguments of the learned advocates for both the parties, the learned Judge of the trial Court

came to a conclusion that prosecution has totally failed to prove the case against the present respondent for which charge was framed against him. On the basis of that conclusion, by rendering his judgement dated 30.4.1988 in aforesaid Sessions Case No. 9/88, he acquitted the accused/respondent under Section 235(1) of Cr.PC of the offences for which charge Exhibit-1 was framed.

4. Being aggrieved against and dissatisfied with the said judgement of acquittal, the State Government has preferred this present appeal.

5. We have heard Shri K.C.Shah, learned APP for the appellant, i.e. State of Gujarat. He has taken us through the entire evidence on record. We have perused the entire record and proceeding of the case which have been called for from the trial Court. Shri Shah has argued that the learned Judge of the trial Court has not appreciated the evidence in the manner in which it ought to have been appreciated, keeping in mind the principle of appreciation of evidence. He has further argued that the learned Judge of the trial Court has misread the evidence and wrongly acquitted the accused. He has also argued that this is a fit case in which the present appeal deserves to be allowed and accused/respondent should be convicted on the basis of evidence on record.

6. We have considered the arguments submitted by Shri K.C.shah, learned APP for the State. We have also reappreciated the evidence on record. We have also taken into account the entire record and proceedings of the case.

7. On reading the FIR, copy of which was sent to the learned Chief Judicial Magistrate, we find that the complaint was registered for the offences punishable under Sections 18, 22, 29(1) of the NDPS Act along with other offences punishable under Sections 66(A), 66(1)(b) and 65(e) of the Prohibition Act, and therefore, the complainant was very much in know of the fact that the action which he had taken was an action, taken under the NDPS Act. Under the circumstances, prosecution was expected to satisfy the Court that while searching and taking the samples from the house raided by the complainant in presence of panch witnesses, the complainant had made full compliance of the mandatory provisions of the NDPS Act. The complainant who searched and seized the contraband articles from the house raided in presence of panch witnesses, was an authorised officer under Section 42(1) of the NDPS Act. The prosecution has

examined the complainant Babuji Kamaji Gameti at Exhibit-7. In his evidence he has deposed that on 11.10.1987 he was performing his duties as Police Inspector in Bhuj City Police Station and on that day he received an information through informant to the effect that one Tagaram Magnaram Choudhary was keeping bottles of liquor in his house. From record, it appears that when he received an information through an informant he received an information with regard to only bottles of English liquor and not for any other contraband article under the NDPS Act, and therefore, at the initial stage, Section 42(1) of the NDPS Act will not be attracted.

8. In the case of State of Punjab Vs. Balbir Singh reported in (1994) 3 SCC 299, the Hon'ble Supreme Court has deduced certain conclusions in para 25. As held in that case; 'if a police office without any prior information as contemplated under the provisions of NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.PC and when such search is completed at that stage, Section 50 of the NDPS Act (relevant to the facts of that case) would not be attracted and the question of complying with the requirements there under would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance, then the police officer who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act".

Looking to above legal position, Mr. Gameti was expected to inform immediately after finding out Opium which is a contraband article under the NDPS Act, his immediate superior officer as per sub-Section 2 of Section 42 of the NDPS Act. Here, in this case, admittedly, immediately after searching out the Opium from the house searched, no such information was sent to immediate superior officer. As per the legal position settled in aforesaid case of Balbir Singh (supra), immediately after finding out the Opium from the house Mr. Gameti was expected to follow and comply with the provisions of Sections 51, 52, 53, 55 and 57 of the NDPS Act. On perusal of the record it appears that the complainant who being a raiding officer did not follow any of the provisions contained under the NDPS Act immediately after knowing that Opium being a contraband article under the NDPS Act was found from the house, and

thus from record, it appears that provisions of Section 42, which is a mandatory Section under the NDPS Act has not been complied with and therefore, the entire raid is vitiated and person against whom charge is framed for the offences under the NDPS Act cannot be convicted. This is a sole ground on which accused/respondent can be acquitted of the offences for which the charge has been framed.

9. The learned Judge of the trial Court has discussed and appreciated the evidence led by the prosecution and he has come to the conclusion that prosecution has failed to prove conscious physical possession of Opium with the accused. Accused has explained his presence when he was arrested. Accused No.1 whose case has been sent to Court Martial, was his real brother. According to accused No.2, i.e., present respondent, he is not residing in that house, and that, he is neither an owner of the house nor he is a tenant in that house. According to him, everyday he was visiting that house for taking meals and as per that routine manner, on that day he was going to that house for taking meals and when he was going to that house he was arrested from the place outside the house. The prosecution has not produced any evidence to prove the conscious physical possession of Opium with the accused/respondent. The learned Judge of the trial Court has assigned cogent, convincing and possible reasons for coming to his conclusion. We are in complete agreement with the reasons assigned by the learned Judge of the trial Court.

10. In support of his defence, the accused/respondent has examined two witnesses in his defence. Accused has examined Manji Keval as defence witness at Exhibit-20. He has deposed that he is residing in the house of ownership of Pappu Devi on rental basis. He has further deposed that there are three other rooms in the compound in which he is staying. Out of that three rooms, he is in possession of two rooms, whereas third room is being used by him as his shop. He has further deposed that on or about 11.10.1987 he was residing in that premises for which he has given description in his evidence. He has further deposed that on his one side, one Mishra, a military person was staying and he was in possession of one room and one Kitchen. Shri Mishra was also a tenant of Pappu Devi. Mishra, whose reference is made by witnesses, is no one else but accused No.1. Therefore, his case has been sent to the Court Martial. As per his evidence, name of husband of Pappu Devi is Tagaram, that is accused No.1. In house of Pappu Devi, six persons

were staying and the gate of the compound was abutting on the road. He has further deposed that accused before the trial Court, i.e., present respondent was visiting that house of Pappu Devi twice a day for taking meals. He has further deposed that accused before the trial Court was not residing with Pappu Devi. This fact is not challenged in cross-examination by the prosecution. Whatever the defence has been put by the accused is required to be proved on the principle of preponderance of probability, i.e., proof as required to be led in the Civil Case. When the accused has led an evidence that he was visiting the house of accused No.1 for the purpose of only taking meals twice a day, no inference can be drawn against him that he was in conscious physical possession of Opium found from the house of Pappu Devi.

11. The accused has also examined one Navinchandra Amrutlal Vyas at Exhibit-22 as his second defence witness. He has proved news item at Exhibit-11 from daily Newspaper Kachahh Mitra. He is a Press Reporter working for Kachchh Mitra daily Newspaper. He has deposed that according to him, first they receive information with regard to such type of incidents from the horses mouth and thereafter they are publishing the news in the Newspaper. He has also deposed that whenever any News item is refuted by others, they are publishing that refutals also in the Newspaper. Exhibit-11 is a news item with regard to the present incident. No refutal has been published with regard to this news item Exhibit-11. The learned Judge of the trial Court has observed in his judgement that; Mr. Gameti has informed the office of Kachchh Mitra that he had sent one bogus customer to that house and that bogus customer purchased Opium from the person who was in possession of that house. He has further observed that according to newspaper item, Exhibit-11, one person on bicycle came out from the house. Thus, whatever information was given at the earliest point of time to this defence witness No.2, is completely in contradiction with the case advanced by the prosecution.

12. We are conscious of the legal position with regard to scope, ambit and powers of this Court while dealing with acquittal appeal. Recently, in the case of C.Antony V. K.G.Raghavan Nair, reported in 2003 (1) SCC page 1, the Supreme Court has, in para 6 observed as under:

> "This Court in a number of cases has held that though the appellate court has full power to review the evidence upon which the order of

acquittal is founded, still while exercising such an appellate power in a case of acquittal, the appellate court, should not only consider every matter on record having a bearing on the question of fact and the reasons given by the courts below in support of its order of acquittal, it must express its reasons in the judgement which led it to hold that the acquittal is not justified. In those line of cases this Court has also held that the appellate court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness-box and the presumption of innocence is not weakened by the order of acquittal, and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the finding of the trial court."

13. While reappreciating the evidence on record, we had kept in mind the legal position with regard to powers of this appellate court, and the principles laid down by the Hon'ble Supreme Court in the case of Ajit Savant Majagvai V. State of Karnataka, reported in 1997 SCC (Criminal) 992. In the said case, the Supreme Court has observed as under:

1. In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

2. The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

3. Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial Court that the accused is entitled to acquittal.

4. In reversing the finding of acquittal, the High Court has to keep in view the fact that

the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court.

5. If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

6. The High Court has also to keep in mind that the trial Court had the advantage of looking at the demeanor of witnesses and observing their conduct in the Court especially in the witness-box.

7. The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

14. Keeping in mind aforesaid principles laid down by the Apex Court, we find no infirmity in the judgement. The learned Judge of the trial Court has properly appreciated the evidence in its correct perspective. We do not find any substantive reason to defer with the views expressed by the learned Judge of the trial Court. We cannot substitute our own decision in place of decision arrived at by the learned Judge of the trial Court who had ample opportunity of seeing the demeanour and conduct of the witnesses. Hence, the judgement which is challenged in this appeal cannot be said to be palpably wrong or manifestly erroneous or demonstrably unsustainable.

15. For the foregoing reasons, this appeal is devoid of merits and it requires to be dismissed. Resultantly, it is dismissed. Bail bonds are cancelled. Surety discharged.

(A.M.Kapadia,J)

(H.H.Mehta,J)

Jayanti*